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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 GRACE BURROWS, *et al.*,

10 Plaintiffs,

11 v.

12 3M COMPANY,

13 Defendant.
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Case No. C19-1649-RSL

EXPERT TESTIMONY
ORDER

15 This matter comes before the Court defendant's: (i) "Motion to Exclude the Expert
16 Testimony of Dr. Anthony Haftel" (Dkt. # 62) and (ii) "Motion to Exclude the Expert
17 Testimony of Larry Steven Londre" (Dkt. # 64). Having reviewed the submissions of the parties
18 and the remainder of the record, and considering the oral arguments conducted on August 2,
19 2022, the Court finds as follows:

20 This matter arises from a fatal construction accident. Walter Burrows was employed by
21 Kiewit-Hoffman East Link Constructors as a foreman on the E360 project in King County,
22 Washington. While working atop a "pier cap" column approximately 35 feet off the ground,
23 Mr. Burrows lost his balance and fell over the edge. Mr. Burrows was wearing a 3M Nano-Lok
24 Self-Retracting Lifeline ("Nano-Lok"), but the Nano-Lok severed after contacting the pier cap's
25 concrete edge. Mr. Burrows fell to the ground and died due to his resulting injuries.

26 Plaintiffs bring failure-to-warn claims under Washington law, alleging that the warnings
27 did not cover the type of edge that severed Mr. Burrows' Nano-Lok. Defendant moves the
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1 Court to exclude the testimony of plaintiffs' experts, Dr. Anthony Haftel and Larry Steven
2 Londre.

3 Federal Rule of Evidence 702 provides that expert opinion evidence is admissible if:
4 (1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or
5 education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact
6 to understand the evidence or to determine a fact in issue; (3) the testimony is based on
7 sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and
8 (5) the expert has reliably applied the relevant principles and methods to the facts of the case.
9 Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014) (citing Fed. R.
10 Evid. 702).

11 In Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the Supreme Court
12 charged trial judges with the responsibility of acting as gatekeepers to prevent unreliable expert
13 testimony from reaching the jury. The gatekeeping function applies to all expert testimony, not
14 just testimony based on the hard sciences. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
15 To be admissible, expert testimony must be both reliable and helpful. The reliability of expert
16 testimony is judged not on the substance of the opinions offered, but on the methods employed
17 in developing those opinions. Daubert, 509 U.S. at 594-95. In general, the expert's opinion
18 must be based on principles, techniques, or theories that are generally accepted in his or her
19 profession and must reflect something more than subjective belief and/or unsupported
20 speculation. Daubert, 509 U.S. at 590. The testimony must also be "helpful" in that it must go
21 "beyond the common knowledge of the average layperson," United States v. Finley, 301 F.3d
22 1000, 1007 (9th Cir. 2002), and it must have a valid connection between the opinion offered and
23 the issues of the case, Daubert, 509 U.S. at 591-92. "The district court is not tasked with
24 deciding whether the expert is right or wrong, just whether his testimony has substance such that
25 it would be helpful to the jury." Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d
26 960, 969 (9th Cir. 2013). "Shaky but admissible evidence is to be attacked by cross
27 examination, contrary evidence, and attention to the burden of proof, not exclusion." Daubert,
28 509 U.S. at 564 (citation omitted). When an expert meets the threshold established by Federal

1 Rule of Evidence 702, “the expert may testify and the jury decides how much weight to give that
 2 testimony.” Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010). Plaintiffs, as the parties
 3 offering Dr. Haftel and Mr. Londre as experts, have the burden of proving both the reliability
 4 and helpfulness of their testimony. Cooper v. Brown, 510 F.3d 870, 942 (9th Cir. 2007).

5 The Court considers defendant’s objections to each expert’s testimony in this context.

6 **I. Dr. Anthony Haftel**

7 Defendant does not attack Dr. Haftel’s qualifications. Rather, defendant objects to Dr.
 8 Haftel’s testimony on the grounds that (A) it is not based on sufficient facts or data and is not
 9 the product of reliable principles and methods, and (B) its probative value is outweighed by the
 10 danger of unfair prejudice.

11 **A. Testimony Based on Sufficient Facts or Data and Product of Reliable** 12 **Principles and Methods**

13 Defendant attacks Dr. Haftel’s testimony on various grounds relating to its base in facts
 14 and data and the principles and methods employed in its production. For the reasons explained
 15 below, the Court rejects these arguments.

16 First, defendant objects that “Dr. Haftel’s conclusion that Mr. Burrows suffered pain
 17 before he died is not based on any facts or data, but instead on Dr. Haftel’s ‘experience’ and
 18 anecdotal memories of patients he treated.” Dkt. # 62 at 6. In the same vein, defendant argues
 19 that Dr. Haftel’s opinions are based not on objective methodology, but on his personal
 20 recollections. See id. at 8-9. Defendant also argues that Dr. Haftel’s comparison of Mr.
 21 Burrows to his previous patients is inappropriate because Dr. Haftel cannot state with certainty
 22 that his patients were assigned a Glasgow Coma Scale¹ score of three, which was the score
 23 assigned to Mr. Burrows. See id. at 6-7.

24 The Court declines to exclude Dr. Haftel’s testimony on the ground that it based only on
 25 his experience as a doctor. It is undisputed that Dr. Haftel is a qualified emergency room

27 ¹ “Based on motor responsiveness, verbal performance, and eye opening to appropriate stimuli,
 28 the Glasgow Coma Scale was designed and should be used to assess the depth and duration [of] coma
 and impaired consciousness.” *Glasgow Coma Scale*, Center for Disease Control,
<https://www.cdc.gov/masstrauma/resources/gcs.pdf> (last visited Aug. 12, 2022).

1 physician. In Messick, the Ninth Circuit held that the district court abused its discretion where it
2 excluded a physician's testimony on the ground that the physician did not explain the scientific
3 basis for his conclusion, but the physician had repeatedly stated that he relied on his own
4 "extensive clinic experience," as well as his examination of the patient's records, treatment, and
5 history. Messick v. Novartis Pharms. Corp., 747 F.3d 1193, 1198 (9th Cir. 2014). As the Ninth
6 Circuit explained, "Medicine partakes of art as well as science, and there is nothing wrong with
7 a doctor relying on extensive clinical experience." Id. Here, Dr. Haftel's report indicates that
8 his opinions are based on his thirty-five years of experience as an emergency department
9 physician working in high acuity trauma centers and his recollection of at least one academic
10 article, as well as his review of Mr. Burrows' EMS run sheet, partial medical records, and
11 autopsy. See Dkt. # 63-1 at 3-4. The Court concludes that Dr. Haftel has presented a sufficient
12 factual and methodological basis for his conclusions.

13 Defendant argues that Dr. Haftel cannot state that his past patients were assigned a
14 Glasgow Coma Scale score of three because he did not go back and review their records.
15 However, Dr. Haftel explained in his deposition that he did not need to do this because he was
16 only considering patients that received CPR, and anyone receiving CPR would have a Glasgow
17 Coma Scale score of three. See Dkt. # 63-2 at 44. Dr. Haftel's response that he could not say
18 with certainty that *he* assigned the patients a Glasgow Coma Scale score of three was because
19 sometimes nurses assign the score. See id. at 50-51. "Shaky but admissible evidence is to be
20 attacked by cross examination, contrary evidence, and attention to the burden of proof, not
21 exclusion." Daubert, 509 U.S. at 564. If defendant believes that Dr. Haftel's opinions rest on a
22 shaky foundation, it may utilize these attacks.

23 Second, defendant objects that Dr. Haftel's classification of Mr. Burrows pain is deficient
24 because he uses descriptive words such as "excruciating," "extreme," "crushing," and "intense,"
25 and these are subjective, non-clinical terms. See Dkt. # 62 at 7-8. Defendant further objects that
26 Dr. Haftel's opinion is inconsistent because he recognizes that unconscious patients cannot
27 report their own subjective pain but nonetheless opines that Mr. Burrows experienced pain while
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1 unconscious. See id. at 7-8. Defendant also takes issue with Dr. Haftel's statement that Mr.
2 Burrows suffered an eleven on a subjective pain scale of one to ten. See id. at 1-2.

3 “‘A trial court should admit medical expert testimony if physicians would accept it as
4 useful and reliable,’ but it need not be conclusive because ‘medical knowledge is often
5 uncertain.’” Primiano, 598 F.3d at 565 (quoting United States v. Sandoval-Mendoza, 472 F.3d
6 645, 655 (9th Cir. 2006)). In particular, “[p]ain is subjective and cannot be described in precise
7 terms.” Bibeau v. Pac. Nw. Rsch. Found. Inc., 188 F.3d 1105, 1108 (9th Cir. 1999), opinion
8 amended on denial of reh'g, 208 F.3d 831 (9th Cir. 2000). Perhaps Dr. Haftel's terms are
9 neither clinical nor precise, but medicine involves a degree of uncertainty and pain lacks
10 objective precision. Defendant is welcome to cross-examine Dr. Haftel regarding the meaning
11 of his terms. Prohibiting Dr. Haftel from utilizing subjective pain descriptors would effectively
12 bar Dr. Haftel from offering any opinions regarding the severity of Mr. Burrows' pain. The
13 Court declines to do so.

14 Regarding the ability of an unconscious person to experience pain, the Court disagrees
15 that Dr. Haftel's opinion is inconsistent. Dr. Haftel made it clear in his deposition that he
16 recognized that unconscious patients cannot report their own subjective pain, but that in his
17 experience, people who have these injuries usually experience pain at these levels. See Dkt.
18 # 63-2 at 53-59, see also Dkt. # 63-1 at 3-4. Regarding defendant's objections to Dr. Haftel's
19 use of a subjective “one to ten” pain scale, the Court notes that Dr. Haftel's report does not
20 utilize this scale. See generally Dkt. # 63-1. It was defendant's counsel that prompted Dr.
21 Haftel to rank pain on this scale during his deposition. See Dkt. # 63-2 at 54-59.

22 To the extent that defendant argues that Dr. Haftel's statement that Mr. Burrows suffered
23 an eleven on a subjective pain scale of one to ten “makes a mockery of evaluating patient pain
24 and has no foundation in science,” Dkt. # 62 at 1-2, 5, the Court disagrees. This statement was
25 made during Dr. Haftel's deposition, and he clarified that the scale only goes up to ten, but that
26 he was “accentuating.” See Dkt. # 63-2 at 58, 62. The Court will not exclude Dr. Haftel's
27 testimony for utilizing acknowledged hyperbole during a deposition. The Court, of course,
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1 assumes that Dr. Haftel will not repeat this statement before the jury, and prohibits plaintiff's
2 counsel from eliciting this statement from Dr. Haftel.

3 The Court will conduct a brief Daubert hearing with Dr. Haftel prior to his testimony
4 before the jury to ensure that he understands the parameters of his opinion testimony.

5 Third, defendant argues that its expert, Dr. Odey Ukpo, concluded that Mr. Burrows
6 suffered a diffuse axonal injury,² and therefore would have experienced no pain. Dkt. # 62 at 4-
7 5. While it appears that Dr. Haftel agrees that a patient who has suffered a diffuse axonal injury
8 would likely not experience pain, Dr. Haftel disagrees with this diagnosis. See Dkt. # 71 at
9 ¶¶ 7-11. To the extent that defendant disagrees with Dr. Haftel's characterization of the facts or
10 his conclusion that Mr. Burrows did not experience a diffuse axonal injury, "issues regarding the
11 correctness of his opinion, as opposed to its relevancy and reliability, are a matter of weight, not
12 admissibility." Messick, 747 F.3d at 1199 (citing Kennedy v. Collagen Corp., 161 F.3d 1226,
13 1229-30 (9th Cir. 1998)). The Court declines to exclude the testimony on this ground.

14 **B. Balancing Probative Value to Risk of Unfair Prejudice**

15 Defendant also argues that Dr. Haftel's testimony should be excluded under Federal Rule
16 of Evidence 403 because its probative value is outweighed by the danger of unfair prejudice. In
17 particular, defendant again objects to Dr. Haftel's use of the subjective terms "excruciating,"
18 "extreme," "crushing," and "intense" to describe Mr. Burrows pain, and analogizes to this
19 Court's decision in Ilyia v. El Khoury, No. C11-1593RSL, 2013 WL 5441356 (W.D. Wash.
20 Sept. 27, 2013).

21 "The court may exclude relevant evidence if its probative value is substantially
22 outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,
23 misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."
24 Fed. R. Evid. 403.

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27 ² "Diffuse axonal injury is the shearing (tearing) of the brain's long connecting nerve fibers
28 (axons) that happens when the brain is injured as it shifts and rotates inside the bony skull." *Traumatic Brain Injury*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/traumatic-brain-injury> (last visited Aug. 12, 2022).

1 First, as explained above, the Court will not exclude Dr. Haftel's testimony because he
 2 used subjective descriptions of pain. Dr. Haftel's terminology is undoubtedly strong, but the
 3 parties agree that Mr. Burrows' pain is at issue, and these terms may assist the jury to
 4 understand his alleged pain. Federal Rule of Evidence 403's concern is "unfair" prejudice, and
 5 any prejudice that may result from Dr. Haftel's testimony does not rise to this level. Defendant
 6 is welcome to offer Dr. Ukpo's contrary testimony.

7 Second, defendant's analogy to Ilyia does not hold up. First, Ilyia was decided under
 8 Federal Rule of Evidence 702, not 403. Ilyia, 2013 WL 5441356 at *1. Second, in Ilyia, this
 9 Court concluded that a psychiatrist's expert testimony regarding a diagnosis of impairment was
 10 not reliable because it was based on a few anecdotal stories about the individual in question and
 11 the offering party provided no evidence that this was a sufficient ground for a forensic
 12 psychiatrist to make a diagnosis. Id. at *1-2. The Court further concluded the testimony was
 13 not helpful because it was overly vague regarding the nature of the impairment and lacked basis
 14 in medical examination and expertise. Id. at *2. Here, as explained above, Dr. Haftel's opinion
 15 is based on sufficient facts and data, and it is based on his expertise. To the extent that
 16 defendant argues that Dr. Haftel's testimony is equivalent to that of the psychiatrist in Ilyia
 17 because both assume the role of telling the factfinder what outcome to reach, there is nothing
 18 inherently wrong with offering such an opinion. See Fed. R. Evid. 704(a) ("An opinion is not
 19 objectionable just because it embraces an ultimate issue.").

20 **II. Larry Steven Londre**

21 Defendant objects to Mr. Londre's testimony on the grounds that (A) he is unqualified to
 22 offer expert testimony on the adequacy of the Nano-Lok's warnings, (B) his opinions have no
 23 methodology, and (C) his opinions are not relevant or helpful to the jury.

24 **A. Expert Qualification**

25 Mr. Londre is a business, marketing, and advertising professional. He holds a Master of
 26 Business Administration, with an emphasis in marketing, from the University of Southern
 27 California, and has extensive teaching and business experience. See Dkt. # 65-3 at 4-5, 21-42.
 28 Defendant argues Mr. Londre's expertise fails to qualify him to testify on whether a product's

1 warnings adequately warn against potential hazards. Defendant's objections to Mr. Londre's
2 expertise are largely focused on his lack of technical expertise in the development of product
3 warnings, the use of warnings for fall protection equipment, and the degree to which warnings
4 mitigate potential hazards under industry standards. See Dkt. # 64 at 7-9. These objections are
5 misplaced. Mr. Londre does not purport to opine on technical matters. Rather, Mr. Londre's
6 opinions go to defendant's promotion of the Nano-Lok, the marketplace for the Nano-Lok, and
7 the lack of communications indicating that the Nano-Lok should not be used near a beveled
8 edge, which he equates to a failure to warn a reasonable buyer or consumer. See Dkt. # 65-3 at
9 6-7, 11, 14, 15, 16, 18. Mr. Londre's marketing and advertising background sufficiently
10 qualifies him as an expert in these matters.

11 **B. Testimony Product of Reliable Principles and Methods**

12 Defendant next argues that Mr. Londre's methodology for reaching his opinions is
13 nonexistent. Mr. Londre's report does not clearly explain his methodology, although it provides
14 a long list of documents and materials that he reviewed in forming his opinions. See Dkt. # 65-3
15 at 39-41. Mr. Londre's declaration submitted with plaintiffs' response states, "My methodology
16 applies marketing, sales, promotion, communication and advertising standards such as the
17 requirement that all statements and representations are true, ethical and not deceptive." Dkt.
18 # 70 at 11.

19 "[T]he trial court has discretion to decide how to test an expert's reliability as well as
20 whether the testimony is reliable, based on 'the particular circumstances of the particular case.'" Primiano, 598 F.3d at 564 (quoting Kumho Tire Co., 526 U.S. at 150, 152). Simply put, it is
21 unclear what principles and methods Mr. Londre purports to have employed. To the extent that
22 Mr. Londre identified a marketing standard and applied it to the facts of the case to reach his
23 opinions, he did not engage in a transparent process. The Court therefore concludes that Mr.
24 Londre's testimony is not the product of reliable principles and methods and excludes Mr.
25 Londre's testimony on this ground.
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1 C. Testimony Relevant and Helpful to Jury

2 Defendant's final objection is that Mr. Londre's testimony is neither relevant nor helpful
 3 to the jury. The Court agrees. The relevance of Mr. Londre's opinions that (1) defendant
 4 promotes the Nano-Lok with the ultimate goal of making sales, Dkt. # 65-3 at 6-7, and
 5 (2) defendant makes and sells the Nano-Lok in a competitive marketplace, id. at 11, is unclear to
 6 the Court. Neither defendant's commercial goals nor the state of the market would assist the
 7 jury in determining the key issue – *i.e.*, whether the Nano-Lok's warnings were sufficient. See
 8 RCW 7.72.030(1).

9 In addition to his ultimate opinion that defendant failed to adequately warn that the Nano-
 10 Lok should not be used near a beveled edge, Mr. Londre offers three other opinions:
 11 (1) defendant's promotion materials describe the Nano-Lok as "the ultimate in fall protection for
 12 any work environment," and the word "ultimate" means to a reasonable consumer "the best
 13 achievable or imaginable of its kind" and "incapable of further analysis, division, or separation,"
 14 (2) defendant promotes and advertises the Nano-Lok with the line, "A complete safety solution
 15 in the palm of your hand," and (3) defendant failed to warn that the Nano-Lok is not to be used
 16 near a beveled edge because Mr. Londre was unable to find drawings or illustrations
 17 demonstrating this limitation. Dkt. # 65-3 at 14, 15, 16, 18. Even assuming these opinions are
 18 relevant, they are not helpful as required under Daubert and its progeny because they do not
 19 appear to be based on any sort of expertise. Mr. Londre's conclusion regarding the meaning of
 20 the word "ultimate" to the "reasonable consumer" is based on Google and Merriam-Webster's
 21 definitions of "ultimate." See id. at 14 n.10. Mr. Londre's opinion that defendant uses the line,
 22 "A complete safety solution in the palm of your hand," is supported only by descriptions of
 23 defendant's brochures. See id. at 15-16. Finally, Mr. Londre's statement that defendant failed
 24 to warn that the Nano-Lok should not be used near a beveled edge is supported by his review of
 25 the Nano-Lok device and relevant brochures and instruction manuals, as well as testimony of
 26 Kiewit-Hoffman personnel to the effect that the Nano-Lok was approved for use on the pier cap
 27 from which Mr. Burrows fell. See id. at 16-17. The jury is equally capable of examining the
 28 evidence that Mr. Londre relies upon, and his conclusions invade its province.

1 The Court therefore excludes Mr. Londre's testimony because it is both unreliable and
2 unhelpful.

3 **III. Conclusion**

4 For all of the foregoing reasons, IT IS HEREBY ORDERED that:

- 5 1. Defendant's Motion to Exclude the Expert Testimony of Dr. Anthony Haftel (Dkt. # 62)
6 is DENIED.
7 2. Defendant's Motion to Exclude the Expert Testimony of Larry Steven Londre (Dkt. # 64)
8 is GRANTED.

9 DATED this 12th day of August, 2022.

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12 Robert S. Lasnik
13 United States District Judge
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